

JGMI/DH

para 5 confirms that one can continue to 'sign on' for availability condition is waived.

Commissioner's File: CSSB/263/85
CAO File: AO 3187/85
LO Maryhill
LO Ref No 611/139131

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO COMMISSIONER FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL UPON A POINT OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Glasgow West

Case No: 1/20/84/07

1. My decision is that the decision of the social security appeal tribunal dated 19 August 1985 is erroneous in law and is set aside. The claimant's case is referred to a differently constituted tribunal for consideration afresh.
2. This is an appeal by an adjudication officer, with leave, upon a point of law against the above-mentioned tribunal decision. The case is one of a number of similar cases the disposal of which was delayed to await the outcome of 2 decisions of a Tribunal of Commissioners, being the decisions on Commissioner's file CSSB/189/1985 and CSSB/232/1985, both as yet unreported, copies of which accompany this decision. Following the issue of the decisions of the Tribunal of Commissioners the claimant's request for an oral hearing in the present appeal was withdrawn.
3. The facts show that on 16 January 1985 the claimant requested the waiving by way of review, with back-dating, of the requirement that he be available for employment as a condition of his entitlement to supplementary benefit. The claimant's request made reference to registering for employment and the adjudication officer's decision and the decision of the tribunal both made reference to that matter. It is however clear that the issue in the case is not as to the requirement of registration under section 5(1)(b) of the Supplementary Benefit Act 1976 but as to the requirement of availability under section 5(1)(a). At the material time the claimant was aged 50 and in receipt of supplementary benefit. He had been unemployed for some 4½ years having been previously employed as a mechanic and before that in various driving jobs. It was found by the tribunal that he did not have either a heavy goods vehicle licence or a City and Guilds mechanic's certificate. He was in good health. The adjudication officer refused the claimant's request under reference to paragraphs (e), (f) and (u) of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. The claimant appealed to a social security appeal tribunal.
4. Section 5(1)(a) of the Supplementary Benefits Act 1976 provides as

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follows:-

"5.-(1) The right of any person to a supplementary allowance is subject-

(a) except in prescribed cases, to the condition that he is available for employment;

....."

Regulation 6 of the Conditions of Entitlement Regulations contains the following material provisions:-

"6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8 does not apply to him:-

.....

.....

(e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding has-

(i) on average worked for less than 4 hours a week,

(ii) been available for employment under section 5 for not less than 39 weeks,

(iii) made reasonable efforts to find employment and not refused any suitable employment;

(f) he has no prospect of future employment and lacks the training or experience to be able to enter or re-enter employment and-

(i) he is within 10 years of attaining pensionable age,

(ii) he has not been in employment in the previous 10 years,

(iii) during that period the requirement to be available for employment pursuant to section 5 has not applied and would not have applied to him had a claim been made for an allowance by or in respect of him;

.....

.....

(u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer it would be unreasonable to require him to be available for employment."

5. At the original hearing of the claimant's appeal before the tribunal the adjudication officer raised a question of the possible loss of credits of contributions for the claimant's retirement pension should he cease to sign as available for employment. The tribunal adjourned the hearing in order to have that matter investigated. A written statement was submitted on behalf of the Principal Adjudication Officer for Supplementary Benefits in Scotland suggesting that regardless of the waiving of the requirement to be available the claimant should continue to sign for credit purposes to protect entitlement to benefits such as retirement pension. It may be that this point requires some emphasis for the guidance of claimants who seek the waiving of the requirement to be available for employment as a condition of entitlement to supplementary benefit. In some cases the ground upon which the requirement is waived may of course be inconsistent with continuing availability for employment. In cases resting, directly or by analogy, on the provisions of paragraphs (e) or (f) of regulation 6 of the Conditions of Entitlement Regulations however, where the main ground of removal of the requirement is the absence of any realistic prospect of further employment, a claimant's availability may well continue and he may be both entitled and well advised to continue signing periodically as required at the unemployment benefit office in order to protect his contributions record. In this connection reference may be made to regulation 9 and 9A of the Social Security (Credits) Regulations 1975 as amended.

6. It was argued on the claimant's behalf at the resumed hearing of the tribunal that the claimant could satisfy the provisions of regulation 6(u) quoted above by analogy with the circumstances mentioned in (e). (It appears that no reliance was sought to be placed on paragraph (f).) It was argued that the claimant's age was analogous to a disablement for the purposes of the opening condition of paragraph (e) causing the claimant to have no further prospect of employment.

7. Although the claimant's case was presented in reliance on regulation 6(u) by analogy with paragraph (e) it is not clear that the tribunal who upheld the claimant's appeal proceeded on the same basis. Their reasons were as follows:-

"The tribunal considered that Conditions of Entitlement Regs. 6(e) applied - . can be regarded as having no further prospect of employment. He is "disabled" because of his age, in the context of the situation of very high male unemployment in his area, and especially because he has no qualifications."

In my judgment the decision of the tribunal must be held to be erroneous in law. While the tribunal would have been entitled to hold that the claimant's age was in his circumstances and as a matter of fact analogous with a physical disablement causing him to have no further prospect of employment - see decision CSSB/189/1985 paragraphs 15 and 23(d) - the tribunal do not appear to have done so but to have proceeded in reliance upon the claimant's direct satisfaction of the opening words of paragraph (e). However that may be, the tribunal were required to consider whether the claimant was able to satisfy the remaining circumstances mentioned in paragraph (e), whether they were considering the possibility of the claimant satisfying those conditions directly or

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by analogy for the purposes of paragraph (u). The tribunal have however not made any reference to these remaining conditions. Furthermore, assuming the tribunal intended to apply paragraph (u) by analogy with paragraph (e), they failed to consider the question of the reasonableness of continuing to require the claimant to be available, a question which must be separately considered under paragraph (u). Finally, the tribunal failed to consider the issue of back-dating raised by the claimant.

8. The decision of the tribunal must be set aside as erroneous in law and the claimant's case referred to a differently constituted tribunal for consideration afresh. That tribunal should have regard to the observations in the immediately preceding paragraph of this decision and also the rulings of the Tribunal of Commissioners in decision CSSB/189/1985 and in particular those summarised in paragraph 23(b), (c), (d), (e) and (g). In the event of the tribunal upholding the claimant's case they will of course require to consider the issue of back-dating and in that connection should have regard to paragraph 10 of decision CSSB/232/1985.

9. The appeal of the adjudication officer is allowed.

(signed) J G Mitchell
Commissioner
Date: 26 March 1987